70-88

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

NO. ~~1398~~

S & E CONTRACTORS, INC., Petitioner

V.

THE UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

BRIEF AMICUS CURIAE OF PROFESSOR HAROLD C. PETROWITZ IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT

This brief is filed by Professor Harold C. Petrowitz, who is admitted to practice before this Court, as amicus curiae, pursuant to the written consent of the Petitioner and Respondent which is on file with the Clerk of this Court.

CERTIFICATION

I hereby certify that I have this day mailed three copies of this brief to Geoffrey Creyke, Jr.,

attorney of record for the Petitioner, and to the Honorable Erwin Griswold, Solicitor General of the United States, attorney of record for Respondent.

July 1, 1971

Harold C. Petrowitz

THE INTEREST OF PROF. HAROLD C. PETROWITZ

Professor Petrowitz strongly supports the position of petitioner.

The decision of the Court of Claims, below, will have a disruptive effect on the orderly development of an important segment of administrative law by introducing great uncertainty into the degree of finality attaching to decisions rendered by federal agencies in contract disputes. This will have an adverse long-run effect because the climate presently favorable to the orderly settlement of government contract disputes will be adversly affected. With the present and projected high level of Government contracting, this is a matter for grave public concern and for particular concern of the industrial community, members of the bar and the courts. It is also a matter of grave concern for members of the academic community who are interested in improving the administration of justice and in elevating the efficiency of the judicial system.

Also of concern to members of the academic community and members of the bar is the threat posed to sanctity of contract by the implications of the decision below.

ISSUES

The facts of this case have been well stated in the brief of the petitioner. The essential references are contained in the Appendix and in petitioner's brief.

This is one of those cases in which the issues - relatively simple at the start - have increased in complexity at each level of controversy: the contracting agency; the Comptroller General; and the Court of Claims.

The original issue in this case can be concisely stated: can a contracting agency with impunity refuse to implement its own decision favorable to the contractor rendered pursuant to the Disputes clause of one of its contracts?

An additional issue was injected almost immediately because the refusal by the agency to implement its decision was the direct result of a ruling by the General Accounting Office reviewing and rejecting the entire claim based on its appraisal of the evidence and legal interpretation of the contract and directing the certifying officer not to issue any payment vouchers in settlement thereof. This raised the question of whether the General Accounting Office in reviewing and denying the entire claim on the basis of Wunderlich Act (41 U.S.C. §§321-22) criteria rather than ruling only on the points raised by the certifying officer acted beyond the scope of its statutory authority.

A final issue was added by the majority opinion of the Court of Claims: can the Government obtain court review of an administrative decision rendered under the Disputes clause in accordance with the criteria laid down in the "Wunderlich Act,"

68 Stat. 81 (1954), 41 U.S.C. §§321-322 (1964)? By answering this question in the affirmative, the Court of Claims cast doubt on the efficacy of the entire administrative structure established for the purpose of resolving government contract controversies.

ARGUMENT

Summary

There has developed in connection with Government contracts a procedure for the resolution of controversies arising under the contract known as "disputes procedure" that brings into operation well-known principles of administrative law. This procedure depends for its success on a relatively expeditious and inexpensive method of securing a remedy to the contractor in exchange for a giving up of the right on the part of the contractor to abandon contract performance and sue in court for breach of contract damages. In order for the system to work, the contractor must have confidence that the administrative process will accord fair and expeditious consideration of valid claims with the reasonable assurance of a prompt and meaningful remedy. Only if this administrative process has a predictable cut-off point free from second-guessing and collateral attack will it be attractive to the contractor who gives up his common-law remedies in exchange for it.

The argument discusses in detail whether a contracting agency can with impunity refuse to implement its administrative decision favorable to the contractor rendered under established disputes procedure on the basis of a collateral adverse ruling

on the merits of the claim conducted on its own initiative by the General Accounting Office and thus force the contractor into court to gain the remedy already administratively decreed. The conclusion is reached that the Government cannot do this without subjecting itself to liability for breach of contract.

INTRODUCTION

It is significant that in this case the final decision under the Disputes clause was rendered not by a contract appeals board but by the head of the agency (the Atomic Energy Commission). This decision was never changed or revoked. The Atomic Energy Commission simply refused to implement its decision which was largely favorable to the contractor. This point is of interest because the majority decision of the Court of Claims speaks extensively of administrative boards instead of agency heads.

Actually the legal framework of this case would not have been altered if the final agency decision had been rendered by an administrative board because most of these boards are delegated authority to decide appeals taken pursuant to contract disputes clauses as fully and finally as can the heads of the agencies whom they represent. See e.g. 32 C.F.R. §30.1(1970) and 41 C.F.R. §5.60.101(1970). Although it is clear that the agency head can revoke this authority in the same manner as it was conferred, once an administrative board renders a decision pursuant to such a grant of authority, that decision becomes the final agency determination from the moment it becomes official. When the board procedure is employed, therefor, this grant of authority constitutes the board as the alter ego or agent of the agency head

for the purpose of deciding controversies under the Disputes clause of contracts.

It is equally clear that administrative jurisdiction to decide appeals under the Disputes clause is contractual. It is a procedure that a party who contracts with the Government accepts as a trade-off for agreeing to continue with contract work as unilaterally directed by the contracting officer.

I.

Can a contracting agency with impunity refuse to implement its own decision favorable to the contractor rendered pursuant to the Disputes clause of one of its contracts?

The language of the Disputes clause states that the decision by the agency head or the duly authorized representative thereof "... shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." Used in this context the "conclusive" means that the decision is binding on the agency (unless determined to be arbitrary, etc.), and there is a clear implication that the decision will be carried out with reasonable promptness as part of the Government's obligation under the contract. Viewed in this light, a refusal by the agency to implement a valid administrative decision rendered pursuant to the contract Disputes clause would be a clear breach of contract. There can be no doubt, then, that if the Government refused to implement its final decision in this case without justification found either in the contract or in statute, the contract was

breached and the Government must answer in damages. It is obvious that a contractor would be foolish in agreeing to a disputes procedure that is incapable of securing for him an expeditious and meaningful remedy. The collateral attack on agency decisions under the Disputes clause and the refusal to implement them invited by the decision of the Court of Claims in this case is certain to work a serious hardship by increasing the degree of risk the contractor must assume. This will, in the long run, discourage industry participation in the Government market place.

II.

Did the General Accounting Office in reviewing and denying the entire claim on the basis of Wunderlich Act criteria rather than ruling only on those points raised by the certifying officer act beyond the scope of its statutory authority?

Since the refusal by the agency to implement its decision was the direct result of a ruling by the General Accounting Office, it must now be determined whether that office acted appropriately under the circumstances and whether its decision was valid and binding.

This case came before General Accounting Office (GAO) when the certifying officer in the Atomic Energy Commission (AEC) sought its advice on two relatively minor points of law related to the decision on the dispute rendered by the Commission. Instead of ruling on the two questions thus raised, the General Accounting Office spent 33 months reviewing the entire AEC decision and then issued a

ruling to the effect that no part of the contractor's claim should be paid, thus reversing the administrative decision.

In referring the two points to GAO for a ruling, the certifying officer was acting pursuant to a 1941 statute, the purpose of which was to clarify the role of certifying officers, 55 Stat. 876, (1941), 31 U.S.C. §82d (1964), Petitioner's Brief p. p. 4-5. Its legislative history makes clear that this statute was not enacted to enlarge the authority of GAO, but rather to minimize the risks assumed by agency officers charged with the duty of certifying payment vouchers. The Comptroller General himself has stated that this legislation did not confer jurisdiction on GAO to render a decision to a certifying officer on general questions, 27 Comp. Gen. 222, 223 (1947). There can be no doubt that the General Accounting Office had authority to rule on the questions of law presented to it by the certifying officer.

But GAO did not limit its review of the matter to the questions referred to it by the certifying officer. Purporting to act under authority conferred by the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U.S.C. §71 (1964), and the "Wunderlich Act," 68 Stat. 81 (1954), 41 U.S.C. §§321-22 (1964), (Petitioner's brief p. p. 3-4), the General Accounting Office reviewed the entire AEC decision and reversed it.

The only pronouncement that has been made by this Court relating to the power of the Comptroller General "to settle and adjust" all Government accounts occurred in United States v. Mason and Hanger Co., 260 U.S. 323 (1922), a case that actually involved the Comptroller of the Treasury, the immediate predecessor of the Comptroller General. In that case this Court held that the parties could by

contract reserve to the contracting officer the right to make a final decision regarding the allowability of costs chargeable to the contract. The opinion did not mention any specific statute but seemed to reflect an overall assessment of the authority of the Government officials involved.

The interesting thing is that no federal court decisions handed down between 1922 and 1965 departed substantially from the rule laid down in United States v. Mason and Hanger, supra. See e.g. Jos. Graham Mfg. Co. v. United States, 91 F. Supp. 715 (N.D. Cal. 1950); John H. Mathis Co. v. United States, 79 F. Supp. 703, 708 (D. N.J. 1948); Livingston v. United States, 101 Ct. Cl. 625, 638 (1944); Zweig v. United States, 92 Ct. Cl. 472, 482 (1941); McShain Co. v. United States, 83 Ct. Cl. 405, 409 (1936). These decisions all have in common a reiteration of the rule that the Comptroller General cannot overrule an essentially factual determination by a contracting agency rendered pursuant to contractual agreement. This line of court decisions appears to stand solidly for the proposition that, although the Comptroller General has the power to rule on specific matters of law referred to him by certifying officers and to determine whether appropriated funds have been expended in accordance with law, he does not have authority to review, as might a court, administrative decisions having a high degree of factual content rendered pursuant to contractual agreement unless there has been fraud or overreaching.

Then in 1954 the so-called Wunderlich Act was passed, 41 U.S.C. §§321-22 (1964) (Appellant's brief p. 3). This statute overruled the decisions of this court in United States v. Moorman, 338 U.S. 457 (1950) and United States v. Wunderlich, 342 U.S. 98 (1951) and established a generally recognized

standard of "appellate" review to administrative decisions rendered pursuant to the Disputes clauses of government contracts. The Comptroller General, both in his decision overruling the AEC in the instant case and in his amicus curiae brief to the Court of Claims has taken the position that the Wunderlich Act conferred on GAO the same authority to review administrative decisions as that Act confers on a court. This contention has no sound basis either in fact or in law.

In the first place, the primary thrust of the Wunderlich Act was to instill in contractors' minds confidence that they would receive fair treatment with adequate procedural safeguards as part of the disputes machinery they had to agree to in accepting a Government contract. The whole context of Section 321 relates solely to court appeal. The words "suit", "pleaded" and "judicial" are used explicitly and there is no reference to the Comptroller General or to the General Accounting Office. Nor was GAO mentioned in the original draft of the legislation. GAO was mentioned expressly in an intermediate draft of that part of the legislation that now corresponds to Section 321, but, in the final version of this section, the reference to GAO was deleted.

What is now Section 322 of the Wunderlich Act was not in the original draft of the legislation but was added to early revisions at the urging of GAO and others. (Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 82nd Cong. 2d Sess, 1952). This section states simply and enigmatically that no Government contract shall contain a provision making final on a question of law any administrative decision. There is no indication that

this section applies to GAO, nor is any other qualification placed on it. The two sections of the statute taken together define almost perfectly the ordinary criteria for appellate court review of the decision of an administrative tribunal or a trial court sitting without a jury.

The legislative history of the Wunderlich Act (discussed exhaustively in Petitioner's brief p. p. 24-49) is not voluminous, but has been cited at various times and places to buttress an astounding variety of interpretations of this statute. By being sufficiently selective in citing from this legislative history, it is easily possible to support diametrically opposed views of what this legislation was intended to accomplish.

After weighing carefully the entire legislative history of the Wunderlich Act, it is possible to reach the following conclusions:

1. Section 321 was intended solely to free contractors from the limitations on court review of administrative decisions imposed by the decision in United States v. Wunderlich, supra. It was not intended to establish the General Accounting Office as a "Court of Claims".

2. Section 322 of the Act was intended to restore to the courts the full scope of appellate review of administrative action and to assure the General Accounting Office of its right to determine that appropriated funds are expended in accordance with the law. This represents the recognized jurisdiction conferred on GAO by the Budget and Accounting Act of 1921.

3. The Act is clearly not jurisdictional. There is no indication whatever that Congress intended to confer on the Government the right to initiate review of administrative decisions to which the Wunderlich Act applies. Indeed, there is no record of the Government ever having initiated in any court an appeal of administrative action on the basis of the Wunderlich Act, nor has the Government contended so far in this proceeding that it has this right.

Therefore, it must be concluded that the General Accounting Office acted beyond its authority in reversing on the basis of Wunderlich Act criteria the administrative decision rendered by AEC and directing that agency not to make payment on any of Petitioner's claims.

III.

Can the Government obtain court review of an administrative decision rendered under the Disputes clause in accordance with the criteria established by the Wunderlich Act?

The Government appears to concede that it cannot initiate a court appeal under the Wunderlich Act by the fact that it has never done so. This position also appears to constitute recognition of the well-established principle that the Government cannot sue itself.

The only means remaining by which the Government can obtain the appellate review specified by the Wunderlich legislation is for the contracting agency to refuse to implement its

own administrative decisions - either on its own initiative or as the result of collateral attack by GAO as occurred in the instant case - and force the contractor to go to court to obtain the remedy decreed at the agency level. This is the approach sanctioned by the decision of the Court of Claims below.

This backhand method of securing review of an administrative decision is basically unfair. It forces the contractor to run the risk of delay and expensive litigation in order to obtain the remedy it contracted for and for which it gave up important common-law rights. Such a rule also encourages the contracting agency to renege on its agreements in the hope of either obtaining the reversal of a decision favorable to the contractor or of running the contractor out of money because of delay in securing payment. There is the constant threat that the Government will litigate the contractor to death as actually happened in this case.

This is not to say that the Government by its chosen instrument, the Department of Justice does not have the right to defend fully any legal action brought against it. The Government should always have this right. All that is being said here is that the contracting agency ought not to renege on its own decision and that the General Accounting Office does not have the authority to intervene under the circumstances of this case. Nor should the Department of Justice presume to "advise" the contracting agency concerning the desirability of forcing the contractor into court by refusing implementation of the administrative decision. This is collateral interference

without any foundation in statute of the same sort as was represented by the intrusion of the General Accounting Office in the instant case. It is the function of the Department of Justice to defend the Government against suits against it and to initiate legal action where authorized to do so by statute. The Department of Justice is not authorized by statute to interfere with the contractual rights of contractors with the Government and to generate litigation thereby.

Actually the Government has a common-law right so declared by this Court to initiate legal action to recover public funds wrongfully, erroneously or illegally paid, United States v. Wurts, 303 U.S. 414, 415 (1938). This rule was recently reaffirmed by a federal court in United States v. Bateson, 308 F.2d 510, 514 (5th cir. 1962).

CONCLUSION

An orderly contracting process requires this Court to overturn the interpretation that the court below has given to the Wunderlich Act and the technique the Government may employ to invoke its application.

The administrative procedure now employed for resolving disputes arising under Government contracts has evolved over a substantial number of years by trial and error. In 1954, it became necessary to make a correction by means of legislation - the Wunderlich Act.

If the process has once again gotten out of joint, the remedy is through legislative action and not by means of the strained interpretation given the law by the court below.

As far as this case is concerned, it is urged that this Court find that the Government has breached its contract with Petitioner and remand the case to the Court of Claims, with directions to grant Petitioner's motion for summary judgment.

Respectfully submitted,

/Harold C. Petrowitz

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Washington, D. C.
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